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In the Supreme Court of the United States

OCTOBER TERM, 1951

TOMOYA KAWAKITA, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is devoted to further consideration of the relationship of the entry of petitioner's name in the family Koseki to expatriation under Section 401(b) of the Nationality Act of 1940, 8 U.S.C. 801(b): —"A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by * * * (b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state."

I

HISTORY AND MEANING OF SECTION 401(b) OF THE NATIONALITY ACT

1. Section 2 of the Citizenship Act of March 2, 1907, 34 Stat. 1228 (8 U.S.C. 17 (1934 ed.)) provided for loss of United States nationality by the taking of "an oath of allegiance to any foreign state." This was interpreted to require an oath prescribed by law or by regulations having the force of law (III Hackworth, Digest of International Law (1942), pp. 218-219), and to include an oath of allegiance to a foreign sovereign as well as a foreign state. *Ex parte Griffin,* 237 Fed. 445, 455 (N.D.N.Y.) No particular formula or phraseology was thought to be required, nor was an appeal to the Deity necessary. III Hackworth, at 219-221. But in every case which has come to our attention there was a specific form of words—sworn, affirmed, or subscribed to by the person involved—which *explicitly and in terms* declared a pledge of allegiance, loyalty, obedience, faithfulness, or service to the foreign country. Merely holding oneself out as a foreign national, even if done officially, was not enough. See III Hackworth, at 219 *ff.*

2. The nationality code proposed to the Congress in 1938 by the Departments of State, Labor, and Justice (see Government's main brief, at pp. 40-41), provided for expatriation by "Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state" (proposed

Section 401(b), Hearings before the Committee on Immigration and Naturalization of the House of Representatives on H. R. 6127, superseded by H. R. 9980, 76th Cong., 1st Sess., p. 490).

The Departments explained this provision as follows (Hearings, *supra,* at p. 490):

> It will be observed that this subsection is also merely a restatement of the rule now contained in the first paragraph of section 2 of the act of March 2, 1907, quoted above. As the governments of some states, notably Russia, do not recognize the "oath", which has a religious connotation, it seems desirable to expand the rule expressly to include "affirmation or other express declaration of allegiance to a foreign state."
>
> This provision is of considerable importance for the reason that the governments of foreign states frequently require that aliens entering their military or other service should take an oath or make a formal declaration of allegiance. Thus, before the United States entered the World War, large numbers of Americans lost their American nationality by taking foreign oaths of allegiance upon entering foreign armies.

(See, to the same effect, Hearings, at p. 131.) Congress adopted the proposal in the terms in which it was made by the three Departments. Section 401(b) of the Nationality Act of 1940.

Thus, there is no indication that Congress desired to change the prior law as to expatriation by the taking of an oath of allegiance, except to make certain that an oath, in the religious sense, was not required, and that a non-religious formal affirmation or declaration of *allegiance* was sufficient. In particular, there is no evidence whatever that Congress thought that a mere official declaration that one was a citizen of another country, *i.e.* a declaration of foreign *nationality,* would fall under Section 401(b) of the 1940 Act. The 1907 Act had required an express declaration of allegiance, a specific pledge of loyalty, fidelity, obedience, or service. A person was not to lose his American nationality unless he voluntarily undertook such an express and solemn obligation of personal allegiance to another country. Merely holding oneself out or registering as a foreign national—without taking the further step of a ceremonial, personal, and specific pledge of allegiance—was not enough.[1]

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[1] See, in addition to the references in III Hackworth, at 217 *ff*, the instances summarized in III Hackworth, at 373-4, in which dual nationals by birth were officially informed by the State Department that they would not expatriate themselves, although living abroad and holding themselves out as nationals of the country of their residence, until they were naturalized abroad or took an oath of allegiance. These cases are referred to in our Memorandum in *Mandoli* v. *Acheson*, No. 597, this Term, at pp. 12-13. See also 1 Imm. & Nat. Dec. 389 (1943), in which the Board of Immigration Appeals held that a 70 year old dual national (at birth) of Germany and the United States had not expatriated herself although she had resided in Germany almost all her life, had used German

So far as its history and wording show, Section 401(b) of the 1940 Act retained the same requirement and did not broaden this mode of expatriation to cover registration or holding oneself out as a foreign national.

It is, of course, true, that if a person has the nationality of a state, the law of that state imposes upon him a duty of allegiance to that state. To such extent, an affirmation that one has nationality is an affirmation of allegiance. But it is clear that this was not the type of affirmation which Congress had in mind in Section 401(b). An American citizen who resides in a foreign country owes a temporary limited duty of allegiance to that country. An affirmation of the fact that he is such a resident would be an affirmation that he owes such temporary allegiance, but it obviously would not be the type of affirmation required by Section 401(b). Congress was dealing, not with the obligation imposed by law, but with the obligation voluntarily assumed, the personal promise of complete fidelity. This is an ancient concept, going back to the oath of fealty in feudal days. It is a concept which we have carried over into our own nationality law in requiring, as the final step of naturalization, the abjuration of former allegiance and the swearing of present allegiance to the

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passports, and had held herself out as a German (pp. 390, 392). This case is also discussed in our Memorandum in the *Mandoli* case, No. 597, at pp. 13-14.

United States. It is this type of personal and specific oath or affirmation, alone, which Congress felt a sufficient act, inconsistent with American citizenship, to justify loss of American nationality.

3. Other evidence from the background and history of the 1940 Act supports this conclusion. As shown in our main brief, pp. 40-44, and in the Memorandum for the Respondent in *Mandoli* v. *Acheson*, No. 597, this Term, the three Departments and the Congress were well aware of the existence of dual nationals by birth, *i.e.*, persons who at their birth had both the nationality of the United States and of another country. They were also well aware that many such dual nationals by birth habitually resided in the countries of their other nationality, and undoubtedly held themselves out as nationals of those countries, while residing there. Though this problem was called to its attention, Congress did not provide that such dual nationals by birth would lose their American citizenship by continuing to reside abroad, or by holding themselves out as nationals of the countries of their residence, or by registering with those countries as a national thereof. Congress contemplated that such dual nationals might continue to reside and live abroad as foreign nationals. It contented itself with providing that they lost their American citizenship only if they performed one of the specific acts listed in Section 401—acts which Congress selected as being so inconsistent with reten-

tion of American citizenship that their performance should lead to automatic expatriation. Perhaps Congress might have added other such acts of expatriation, including holding oneself out officially as a foreign national, but it did not do so, though it was aware of the problems and circumstances of dual nationality. It apparently was of the view that a dual national who did not specifically and personally swear or affirm loyalty to the other nation, but merely held himself out as a national while there, should not lose his American citizenship.

Indeed, Congress deleted from the nationality code, as proposed by the Executive, a mode of expatriation based solely on holding oneself out, affirmatively and officially, as a foreign national. The three Departments suggested that loss of American nationality should result from "using a passport of a foreign state as a national thereof." One who obtains and uses a passport of a foreign state as a national certainly declares to that state, in a most formal way, that he is a national thereof. Nevertheless, this provision was omitted after representations that dual nationals erroneously denied an American passport would be obliged to obtain a passport from the foreign state, and that foreign passports (unlike American) generally did not require an oath of allegiance. See Government's main brief, pp. 46-47 (fn. 26). The omission of this provision is further evidence that Congress did not desire or intend to expatriate dual na-

tionals who merely held themselves out as nationals of the state of their other nationality.

4. So far as we have been able to discover, Section 401 (b) has been interpreted since 1940 to require an *express and formal* pledge to the foreign state of allegiance, loyalty, fidelity, obedience, or service. See III Hackworth, at 217 *ff*; 1 Imm. and Nat. Decisions 317 (oath of allegiance exacted by employer not enough), 673 (similar situation); see also p. 548 (oath subscribed to but not taken). As these administrative decisions show, holding oneself out as a foreign national does not fall within either Section 2 of the 1907 Act or Section 401 (b) of the 1940 Act. See also 1 Imm. and Nat. Decisions 389, discussed in footnote 1, *supra*.

II

THE ENTRY OF PETITIONER'S NAME IN THE FAMILY KOSEKI.

1. It is agreed that petitioner's name was entered in the family Koseki in March 1943. This entry consisted merely of entering him as nephew of the head of the family (Yasoemon Kawakita, his uncle), with his name, his father's and mother's name, his date of birth, the fact that he was his parents' second son, and the remark that he was born at Calexico, Imperial Valley, California, United States of America, and was registered by House Master (*i.e.*, head of the family) Yasoemon Kawakita on March 8, 1943, and was entered into the register.[1a]

[1a] Petitioner's family Koseki was not introduced into evidence.

Petitioner did not testify, and it is not claimed, that at the time of entry he took an oath or signed or uttered any words of allegiance, loyalty, fidelity, obedience, or service. See Tr. 4051-4053, 4384-4386. Nor was it customary, or usual, or required, for such an oath or declaration of allegiance to be made on entry in the Koseki. See Blakemore, *Recovery of Japanese Nationality as Cause for Expatriation in American Law*, 43 American Journal of International Law 441, 443 (1949);[2] *Fujizawa v. Acheson*, 85 F. Supp. 674, 676 (S.D. Cal.).

The Attorney General of Japan testified (by deposition) that entry into the family register is not a prerequisite to acquisition of Japanese nationality by dual nationals by birth, like petitioner. Such persons have Japanese nationality from birth, whether or not they are entered in the register. See Tr. 4004. The Attorney General also testified that changing of the residence of a dual national from the United States to Japan does not affect his Japanese nationality at all. See Tr. 4005. He concluded his deposition by stating (Tr. 4006-4007): "In Japan, all Japanese Nationals are duty bound to Japanese allegiance. This is also true of those Japanese Nationals who are born

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[2] This article is mainly concerned with the *recovery* of Japanese nationality by those who had, like Fujizawa but not petitioner, renounced Japanese nationality, and then sought to regain it. Persons who sought recovery of nationality had to perform other formalities, in addition to having their names entered in the Koseki.

in foreign countries of Japanese parents. The registration into the Family Register is not necessarily a formal declaration of allegiance but merely a reaffirmation of an allegiance to Japan which already exists."

2. The entry of petitioner's name in the Koseki was, therefore, not an acquisition of Japanese nationality, nor did it entail any specific declaration or words of allegiance, loyalty, fidelity, obedience, or service. The entry was no more than an official registration of petitioner as a Japanese national. It was open and official recognition of an existing fact and of an existing status which petitioner had had since birth. It was precisely the same as if a dual national of Great Britain and the United States, residing in the former country, had registered himself with the British census as a British subject, or had secured an identity card describing himself as a British subject, or had listed himself in a post office or police station as British.

3. As we have shown above in Part I, neither Section 2 of the 1907 Act nor Section 401 (b) of the 1940 Act expatriates a dual national who does no more than declare himself or hold himself out as a national of the other country.[3] That is all that petitioner did by having his name entered in

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[3] In *Matter of R* ———, 1 Imm. and Nat. Dec. 389, 392 (*supra*, fn. 1), the Board of Immigration Appeals said:

> Mrs. R.....'s entire history prior to 1938 shows that she has considered herself a German citizen, but as she had dual citizenship her various acts as a German

the Koseki. Certainly, the acquisition and use of a foreign passport as a national of the foreign country is no less open a declaration of foreign nationality than entry in the Koseki, and the former has never been held enough, as we point out above.

In short, for expatriation under Section 2 of the 1907 Act or Section 401 (b) of the 1940 Act, a specific and formal declaration of allegiance, loyalty, obedience, fidelity, or service has always been held necessary. *Supra,* pp. 1-8. There is no showing, and no claim, that petitioner made such a specific and formal declaration at any time, either in connection with the registration in the Koseki or otherwise. All he did was to have himself officially registered as the Japanese national that he always was, in addition to being an American. And the jury found that he did not believe that by making this entry he had lost or renounced his American citizenship.

4. During World War II, thousands of Niseis with dual nationality, living in Japan, had their names entered in the Koseki for rationing, employment, and identification purposes, since the family register system is so widely used in Japan. See the Government's main brief, p. 36, fn. 16.[4] If such

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citizen are in recognition of one of the two citizenships with which she was vested at birth and are not in derogation or denial of her American citizenship.

[4] Petitioner apparently told the American consul in December 1945 that the entry into the Koseki "was taken under

an entry is held to fall under Section 401 (b), these persons will have automatically expatriated themselves,[5] even though this has not heretofore been the view of the Executive, and it has not been administratively held, or urged upon the courts, that a mere entry in the Koseki falls within Section 401 (b). For instance, in *Acheson* v. *Okimura,* 342 U.S. 899, and *Acheson* v. *Murata,* 342 U.S. 900, the appellees were both undoubtedly entered in the family register (see Statement as to Jurisdiction, No. 422, this Term, at pp. 5-6), but no defense was made by the Government on that ground. The same is doubtless true of *Kuniyuki* v. *Acheson,* No. 492, in which certiorari was denied on March 3, 1952. This consistent administrative practice confirms the conclusions reached above as to the relationship of an entry into the Koseki to Section 401 (b).

Petitioner's status must, of course, be determined by the same tests as would be applied if he were a Nisei, or other dual national, claiming the right to return to this country and to live here as an American citizen. If he is held to be expatriated, it would follow that other dual nationals who were similarly registered or who officially declared

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severe pressure by the Japanese police and by his uncle, on whom he was financially dependent, after his supply of funds from the U. S. was cut off." (Ex. 2).

[5] As well as other dual nationals who similarly register or declare themselves as nationals of the other country.

themselves as nationals of the other country will also have lost their American citizenship. Such a result would run contrary to the history and terms of Section 401 (b), and would go far to render meaningless the deliberate Congressional choice, in 1940, that dual nationals by birth could continue to be Americans unless they performed one of the specific acts prescribed in Section 401. Subsection (b) of Section 401 should not be expanded by interpretation to nullify this legislative purpose.

Respectfully submitted,

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APRIL 1952

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